

Commodity Futures Trading Commission

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190.08 Allocation of property and allowance of claims.

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APPENDIX A TO PART 190—BANKRUPTCY FORMS

APPENDIX B TO PART 190—SPECIAL BANKRUPTCY DISTRIBUTIONS

AUTHORITY: 7 U.S.C. 1a, 2, 4a, 6c, 6d, 6g, 7a, 12, 19, and 24, and 11 U.S.C. 362, 546, 548, 556, and 761-766, unless otherwise noted.

SOURCE: 48 FR 8739, Mar. 1, 1983, unless otherwise noted.

§ 190.01 Definitions.

For purposes of this part:

(a) *Account class* means each of the following types of customer accounts which must be recognized as a separate class of account by the trustee: futures accounts, foreign futures accounts, leverage accounts, commodity option accounts, delivery accounts as defined in § 190.05(a)(2), and, only with respect to the bankruptcy of a commodity broker that is a futures commission merchant, cleared OTC derivatives accounts; *Provided, however*, That to the extent that the equity balance, as defined in § 190.07, of a customer in a commodity option, as defined in § 1.3(hh) of this chapter, may be commingled with the equity balance of such customer in any domestic commodity futures contract pursuant to regulations under the Act, the aggregate shall be treated for purposes of this part as being held in a futures account; *Provided, further*, that, if positions in commodity contracts that would otherwise belong to one account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), are, pursuant to a Commission order, commingled with positions in commodity contracts of the futures account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), then the former positions (and the relevant money, securities, and/or other property) shall be treated, for purposes of this part, as being held in an account of the futures account class.

(b) *Allowed net equity* means the amount calculated as allowed net equity in accordance with § 190.07(a).

(c) *Bankruptcy Code* means, except as the context of the regulations in this

part otherwise requires, those provisions of the Bankruptcy Reform Act of 1978, as amended from time to time, relating to ordinary bankruptcies (chapters 1 through 5) and to liquidations (chapter 7 with the exception of subchapter III), together with the Federal rules of bankruptcy procedure relating thereto.

(d) *Business day* means weekdays, not including Federal holidays.

(e) *Clearing organization* shall have the same meaning as that set forth in section 761(2) of the Bankruptcy Code and shall include any organization which clears commodity options which are traded on or subject to the rules of a contract market or a board of trade.

(f) *Commodity broker* means any person who is registered or required to register as a futures commission merchant under the Commodity Exchange Act including a person registered or required to be registered as such under parts 32 and 33 of this chapter, and a “commodity options dealer,” “foreign futures commission merchant,” “clearing organization,” and “leverage transaction merchant” with respect to which there is a “customer” as those terms are defined in this section, but excluding a person registered as a futures commission merchant under section 4f(a)(2) of the Commodity Exchange Act.

(g) *Commodity contract* shall have the same meaning, subject to paragraph (nn) of this section, as that set forth in section 761(4) of the Bankruptcy Code.

(h) *Commodity options dealer* shall have the same meaning as that set forth in section 761(6) of the Bankruptcy Code.

(i) *Court* means the bankruptcy court having jurisdiction over the debtor's estate.

(j) *Cover* shall have the same meaning as that set forth in § 1.17(j) of this chapter.

(k) *Customer* shall have the same meaning as that set forth in section 761(9) of the Bankruptcy Code.

(l) *Customer claim of record* means a customer claim which is determinable solely by reference to the records of the debtor.

(m) *Customer class* means each of the following two classes of customers

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which must be recognized by the trustee: public customers and non-public customers.

(n) *Customer property, customer estate* are used interchangeably to mean the property subject to pro rata distribution in a commodity broker bankruptcy which is entitled to the priority set forth in section 766(h) of the Bankruptcy Code and includes certain cash, securities, and other property as set forth in §190.08(a).

(o) *Dealer option* means an option granted, offered or sold pursuant to section 4c(d) of the Act and the Commission's regulations thereunder.

(p) *Debtor* means an individual, association, partnership, corporation, or trust with respect to which a proceeding is commenced under subchapter IV of chapter 7 of the Bankruptcy Code.

(q) *Equity* means the amount calculated as equity in accordance with §190.07(b)(1).

(r) *Filing date* means the date a petition commencing a proceeding under the Bankruptcy Code is filed.

(s) *Final net equity determination date* means the latest of

(1) The day immediately following the day on which all commodity contracts held by or for the account of customers of the debtor have been transferred, liquidated or satisfied by exercise or delivery,

(2) The day immediately following the day on which all property other than commodity contracts held for the account of customers has been transferred, returned or liquidated,

(3) The bar date for filing customer proofs of claim, or

(4) The day following the disposition of all disputed claims.

(t) *Foreign future* shall have the same meaning as that set forth in section 761(11) of the Bankruptcy Code.

(u) *Foreign futures commission merchant* shall have the same meaning as that set forth in section 761(12) of the Bankruptcy Code.

(v) *Funded balance* means the amount calculated as funded balance in accordance with §190.07(c).

(w) *House account* means any commodity account owned by the debtor.

(x) *In-the-money amount* means:

(1) With respect to a call option, the amount by which the value of the physical commodity or the contract for sale of a commodity for future delivery which is the subject of the option exceeds the strike price of the option; and

(2) With respect to a put option, the amount by which the value of the physical commodity or the contract for sale of a commodity for future delivery which is the subject of the option is exceeded by the strike price of the option.

(y) *Joint account* means any commodity account held by more than one person and includes any account of a commodity pool which is not a legal entity.

(z) *Leverage transaction merchant* shall have the same meaning as that set forth in section 761(14) of the Bankruptcy Code.

(aa) *Net equity* means the amount calculated as net equity in accordance with §190.07(b).

(bb) *Non-public customer* means any person enumerated in §1.3(y), §1.3(uu) or §31.4(e) of this chapter, who is defined as a customer under paragraph (k) of this section.

(cc) *Open commodity contract* means a commodity contract which has been established in fact and which has not expired, been redeemed, been fulfilled by delivery or exercise, or been offset by another commodity contract.

(dd) *Order for relief* means the filing of the petition in bankruptcy in a voluntary case and the adjudication of bankruptcy in an involuntary case.

(ee) *Premium* means the amount agreed upon between the purchaser and seller, or their agents, for the purchase or sale of a commodity option.

(ff) *Primary liquidation date* means the first business day immediately following the day on which all commodity contracts have been liquidated or transferred which are not being held open for later transfer in accordance with §190.03.

(gg) *Principal contract* means a contract which is not traded on a board of trade, and includes leverage contracts and dealer options, but does not include transactions executed off the floor of a board of trade pursuant to rules approved by the Commission or

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rules which the board of trade is required to enforce, or pursuant to rules of a board of trade located outside the United States, its territories or possessions.

(hh) *Public customer* means any person defined as a customer under paragraph (k) of this section except a non-public customer.

(ii) *Security* shall have the same meaning as that set forth in section 101(36) of the Bankruptcy Code.

(jj) *Short term obligation* means any security, note, or other obligation with a duration or maturity date of 180 days or less.

(kk) *Specifically identifiable property* means:

(1) With respect to the following property received, acquired, or held by or for the account of the debtor from or for the account of a customer to margin, guarantee or secure an open commodity contract:

(i) Any security which as of the filing date is:

(A) Held for the account of a customer;

(B) Registered in such customer's name;

(C) Not transferable by delivery; and

(D) Not a short term obligation; or

(ii) Any warehouse receipt, bill of lading or other document of title which as of the filing date:

(A) Can be identified on the books and records of the debtor as held for the account of a particular customer; and

(B) Is not in bearer form and is not otherwise transferable by delivery.

(2) With respect to open commodity contracts, and except as otherwise provided in paragraph (kk)(7) of this section, any such contract which:

(i) As of the filing date is identified on the books and records of the debtor as held for the account of a particular customer;

(ii) Is a bona fide hedging position or transaction as defined in §1.3(z) of this chapter or is a commodity option transaction which has been determined by the contract market to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been adopted in accordance with the requirements of

§1.61(b) of this chapter and approved by the Commission pursuant to section 5a(a)(12) of the Commodity Exchange Act; and

(iii) Is in an account designated in the accounting records of the debtor as a hedging account in accordance with §190.04(e)(1).

(3) With respect to warehouse receipts, bills of lading or other documents of title, or physical commodities received, acquired, or held by or for the account of the debtor for the purpose of making or taking delivery or exercise from or for the account of a customer, any such document of title or commodity which as of the entry of the order for relief can be identified on the books and records of the debtor as received from or for the account of a particular customer as held specifically for the purpose of delivery or exercise.

(4) Any cash or other property deposited prior to the entry of the order for relief to pay for the taking of physical delivery on a long futures contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date, which cash or other property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three business days before the first notice date or three business days before the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the strike price upon exercise, respectively, and such customer takes delivery or exercises the option in accordance with the applicable contract market rules.

(5) The cash price tendered for any property deposited prior to the entry of the order for relief to make physical delivery on a short futures contract or for exercise of a long put or a short call option contract on a physical commodity, which cannot be settled in cash, to the extent it exceeds the amount necessary to margin such contract prior to the notice date or exercise date, which property is identified on the books and records of the debtor

as received from or for the account of a particular customer on or after three business days before the first notice date or three business days before the exercise date specifically for the purpose of a delivery or exercise, respectively, and such customer makes delivery or exercises the option in accordance with the applicable contract market rules.

(6) Notwithstanding paragraph (kk)(1) of this section, fully paid, non-exempt securities identified on the books and records of the debtor as held by the debtor for or on behalf of the commodity account of a particular customer for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity.

(7) Open commodity contracts transferred in accordance with the provisions of § 190.06.

(8) Except as is otherwise specified in this paragraph (kk), no customer property may be treated as specifically identifiable property.

(9) Notwithstanding any other provision of this paragraph (kk), security futures products, and any money, securities or property held to margin, guarantee or secure such products, or accruing as a result of such products, shall not be considered specifically identifiable property for the purposes of Subchapter IV of the Bankruptcy Code or this part 190, if held in a securities account.

(11) *Strike price* means the price per unit multiplied by the total number of units at which a person may purchase or sell the physical commodity or the contract of sale of a commodity for future delivery which is the subject of a commodity option.

(mm) *Trustee* means, as appropriate, the trustee in bankruptcy appointed to administer the debtor's estate and any interim or successor trustee.

(nn) *Leverage contract* shall have the same meaning as that set forth in § 31.4(w) of this chapter.

(oo) *Cleared OTC derivatives* shall mean positions in commodity contracts that have not been entered into or traded on a contract market (as such term is defined in § 1.3(h) of this chapter) or on a derivatives transaction execution facility (within the

meaning of Section 5a of the Act), but which nevertheless are submitted through a commodity broker that is a futures commission merchant (as such term is defined in § 1.3(p) of this chapter) for clearing by a clearing organization (as such term is defined in this section), along with the money, securities, and/or other property margining, guaranteeing, or securing such positions, which are required to be segregated or set aside, in accordance with a rule, regulation, or order issued by the Commission, or which are required to be held in a separate account for cleared OTC derivatives only, in accordance with the rules or bylaws of a clearing organization (as such term is defined in this section).

(Secs. 2(a), 4c, 4d, 4g, 5, 5a, 8a, 15, 19 and 20 of the Commodity Exchange Act, as amended by the Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat. 2294 (1983), 7 U.S.C. 2 and 4a, 6c, 6d, 6g, 7, 7a, 12a, 19, 23 and 24 (1976 & Supp. V. 1981 and Pub. L. 97-444); secs. 761-766 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Act Amendments, Pub. L. 97-222, 96 Stat. 235 (1982), 11 U.S.C. 761-766 (Supp. V. 1981 as amended by Pub. L. 97-222))

[48 FR 8739, Mar. 1, 1983; 48 FR 15122 and 15123, Apr. 7, 1983, as amended at 48 FR 28980, June 24, 1983; 49 FR 5541, Feb. 13, 1984, 50 FR 34617, Sept. 6, 1985; 59 FR 5704, Feb. 8, 1994; 66 FR 20745, Apr. 25, 2001; 67 FR 58298, Sept. 13, 2002; 75 FR 17302, Apr. 6, 2010]

EFFECTIVE DATE NOTE: At 77 FR 6378, Feb. 7, 2012, § 190.01 was amended by redesignating paragraphs (e) through (oo) as (f) through (pp); adding a new paragraph (e); and revising paragraphs (a), and newly redesignated paragraphs (f), (cc), (hh), (ll)(2)(ii), (ll)(4), (ll)(5), and (pp), effective April 9, 2012. For the convenience of the user, the added and revised text is set forth as follows:

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* * * * *

(a)(1) *Account class* means each of the following types of customer accounts which must be recognized as a separate class of account by the trustee: futures accounts, foreign futures accounts, leverage accounts, delivery accounts as defined in § 190.05(a)(2) of this part, and cleared swaps accounts.

(2)(i) To the extent that the equity balance, as defined in § 190.07 of this part, of a customer in a commodity option, as defined in § 1.3 of this chapter, may be commingled with the equity balance of such customer in any domestic commodity futures contract pursuant to regulations under the Act, the

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aggregate shall be treated for purposes of this part as being held in a futures account.

(ii) To the extent that such equity balance of a customer in a commodity option may be commingled with the equity balance of such customer in any cleared swaps account pursuant to regulations under this act, the aggregate shall be treated for purposes of this part as being held in a cleared swaps account.

(iii) If positions or transactions in commodity contracts that would otherwise belong to one account class (and the money, securities, or other property margining, guaranteeing, or securing such positions or transactions), are, pursuant to a Commission rule, regulation, or order (or a derivatives clearing organization rule approved in accordance with §39.15(b)(2) of this chapter), held separately from other positions and transactions in that account class, and are commingled with positions or transactions in commodity contracts of another account class (and the money, securities, or other property margining, guaranteeing, or securing such positions or transactions), then the former positions (and the relevant money, securities, or other property) shall be treated, for purposes of this part, as being held in an account of the latter account class.

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(e) *Calendar day.* A calendar day includes the time from midnight to midnight.

(f) *Clearing organization* shall have the same meaning as that set forth in section 761(2) of the Bankruptcy Code.

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(cc) *Non-public customer* means any person enumerated in the definition of *Proprietary Account* in §1.3 or §31.4(e) of this chapter, any person excluded from the definition of "foreign futures or foreign options customer" in the proviso to section 30.1(c) of this chapter, or any person enumerated in the definition of *Cleared Swaps Proprietary Account* in §22.1 of this chapter, in each case, if such person is defined as a "customer" under paragraph (k) of this section.

* * * * *

(hh) *Principal contract* means a contract which is not traded on a designated contract market, and includes leverage contracts and dealer options, but does not include:

(1) Transactions executed off the floor of a designated contract market pursuant to rules approved by the Commission or rules which the designated contract market is required to enforce, or pursuant to rules of a foreign board of trade located outside the United States, its territories or possessions; or

(2) Cleared swaps contracts.

* * * * *

(1) * * *

(2) * * *

(ii) Is a bona fide hedging position or transaction as defined in §1.3 of this chapter or is a commodity option transaction which has been determined by the registered entity to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been approved by the Commission pursuant to section 5c(c) of the Commodity Exchange Act; and

* * * * *

(4) Any cash or other property deposited prior to the entry of the order for relief to pay for the taking of physical delivery on a long commodity contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date, which cash or other property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the strike price upon exercise, respectively, and such customer takes delivery or exercises the option in accordance with the applicable designated contract market rules.

(5) The cash price tendered for any property deposited prior to the entry of the order for relief to make physical delivery on a short commodity contract or for exercise of a long put or a short call option contract on a physical commodity, which cannot be settled in cash, to the extent it exceeds the amount necessary to margin such contract prior to the notice date or exercise date, which property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of a delivery or exercise, respectively, and such customer makes delivery or exercises the option in accordance with the applicable contract market rules.

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(pp) *Cleared Swap.* This term shall have the same meaning as set forth in §22.1 of this chapter.